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82-115

No. _____

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1981

RAMON CERVANTES,
Petitioner

VS.

THE STATE OF TEXAS,
Respondent

On Writ of Certiorari to the
Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHAT LIMITATIONS ON THE RIGHT OF CROSS EXAMINATION, IF ANY, ARE PERMITTED UNDER THE COURT'S OPINION IN *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)?

II. DOES THE FAILURE OF THE COURT BELOW TO CONSIDER PETITIONER'S ARGUMENT ON APPEAL DEPRIVE HIM OF DUE PROCESS OF LAW OR EFFECTIVE ASSISTANCE OF COUNSEL?

TABLE OF CONTENTS

Page

Questions Presented for Review i

This Table of Contents ii

Table of Authorities iii

Opinion Below 1

Jurisdiction 1

Constitutional Provisions and Statutes Involved 2

Statement of the Case 2

Reasons for Granting the Writ

I. The Limitations Imposed by the Trial Court on the Cross Examination of the State's Principal Witness Violated the Constitutional Strictures of *Davis v. Alaska* 5

II. The Failure of the Court Below to Consider Petitioner's Argument on Appeal Deprived Him of Due Process of Law and Effective Assistance of Counsel 10

Appendices

A. Opinion of the Court Below

B. Order Overruling Motion for Rehearing

C. Excerpt from Appellant's Original Brief

D. Excerpt from State's Original Brief

E. Excerpt from Petitioner's Motion for Rehearing *En Banc*

LIST OF AUTHORITIES CITED

CASES:

Ahearn v. State, 588 S.W.2d 327 (1979) 11

Anders v. California, 386 U.S. 738 (1967) 12

Brookhart v. Janis, 384 U.S. 129 7

Carillo v. State, 591 S.W.2d 876 (Tex. Cr. App. 1979) 5, 8, 10

Castle v. United States, 399 F.2d 642 (5th Cir. 1968) 12

Chavis v. North Carolina, 637 F.2d 213 (4th Cir. 1980) 6, 9

Chipman v. Mercer, 628 F.2d 528 (9th Cir. 1980) 8

Davis v. Alaska, 415 U.S. 308 ..... 4, 5, 7, 8, 9, 10

Douglas v. California, 372 U.S. 353 (1963) 12

Eaton v. City of Tulsa, 415 U.S. 697 (1974) 12

Griffin v. Illinois, 351 U.S. 12 (1956) 12

Hawkins v. State, 613 S.W.2d 720 (1981) 11

Hovey v. Elliot, 167 U.S. 409 (1897) 13

Macon v. Lash, 458 F.2d 942 (7th Cir. 1972) 12

Plair v. State, 276 S.W. 267 (Tex. Cr. App. 1926) 11

Randle v. State, 565 S.W.2d 927 (Tex. Cr. App. 1978) 4

Ruetz v. Lash, 500 F.2d 1225 (7th Cir. 1974) 12

Simmons v. State, 548 S.W.2d 386 (Tex. Cr. App. 1977) 4, 5, 6

Skinner v. Cardwell, 564 F.2d 1381 (9th Cir. 1977) (dictum), *cert. denied*, 435 U.S. 1009 (1978) 7

Smith v. Illinois, 390 U.S. 129 (1968) 7

United States v. Alvarez-Lopez, 559 F.2d 1155 (9th Cir. 1977) 7

United States v. Brown, 546 F.2d 166, 172 (5th Cir. 1977) 8

United States v. Croucher, 532 F.2d 1042, (5th Cir. 1976) 6

United States v. Crumley, 565 F.2d 945 (5th Cir. 1978) 10

United States v. Duhart, 511 F.2d 7 (6th Cir. 1975) *cert. dism'd*, 421 U.S. 1006 (1975) 8

United States v. Gambler, 662 F.2d 834 (D.C. Cir. 1981) 8

United States v. Hall, 653 F.2d 1002 (5th Cir. 1981) 6

United States v. Hawkins, 661 F.2d 436, (5th Cir. 1981) 6

United States v. Jorgenson, 451 F.2d 516 (10th Cir. 1971) *cert denied*, 443 U.S. 319 (1972) 7

United States v. Morris, 485 F.2d 1385 (5th Cir. 1978) 7

United States v. Price, 577 F.2d 1356 (9th Cir. 1978) *cert. denied* 444 U.S. 1081 (1980) 8

United States v. Uramoto, 638 F.2d 84 (9th Cir. 1980) 7

United States v. Williams, 668 F.2d 1064 (9th Cir. 1981) 6, 8

OTHER:

United States Code, Title 28,
Sec. 1257(3) 2

Vernon's Texas Code Annotated,
Penal Code Sec. 15.03 2

Vernon's Texas Code Annotated,
Code of Criminal Procedure (1979),
Art. 4.03 11

Art. 44.24(c) 11

Vernon's Texas Constitution (1955),
Art. V, Sec. 5 11

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IN THE
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RAMON CERVANTES,

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VS.

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PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

Ramon Cervantes prays that a writ of certiorari issue to review the judgment of the Texas Court of Criminal Appeals entered on April 14, 1982. Appellant Cervantes' Motion for Rehearing *en banc* was denied May 26, 1982.

OPINION BELOW

The Texas Court of Criminal Appeals is the highest court in Texas for criminal cases. It affirmed Petitioner's conviction for the offense of solicitation to commit capital murder in an unpublished, *per curiam*, opinion handed down on April 14, 1982 (See Appendix A). Petitioner's Motion for Rehearing *en banc* was denied without opinion on May 26, 1982 (see Appendix B).

JURISDICTION

In its May 26, 1982 Order denying Petitioner's Motion for Rehearing, the Texas Court of Criminal

Appeals agreed to stay the issuance of its mandate for 30 days to give Petitioner time to file the Petition for Writ of certiorari. Further stays will be sought from the court below, or from this Court if necessary, after this Petition is filed. Under Rule 20.4, Supreme Court Rules, Petitioner has 60 days (until July 26, 1982) in which to file this Petition. Jurisdiction of this Court to review a decision of the highest court of a state lies under Title 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution: No person shall . . . be deprived of life, liberty or property without due process of law . . . .
2. The Sixth Amendment, United States Constitution: In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.
3. The Fourteenth Amendment, United States Constitution:
   . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was charged by indictment with the offense of solicitation to commit capital murder alleged to have occurred on or about October 23, 1976 in Dallas, Texas. *See* Sec. 15.03, V.T.C.A., Penal Code. A jury in the Criminal District Court No. 4 of Dallas County, Texas convicted Petitioner on November 9, 1977 and assessed his sentence at 15 years confinement in the Texas Department of Corrections.

This was essentially an aborted murder-for-hire case. The State's principal witness, Michael Moore, testified that he received a telephone call at his apartment on October 5, 1976 from someone later identified as Petitioner. Petitioner discussed the possibility of Moore's killing Petitioner's next door neighbor for $3,000. Moore went directly to the police and later testified that all subsequent conversations with Petitioner were tape-recorded.

There followed approximately seven telephone conversations between Petitioner and Moore over the next 18 days, almost all of which were initiated by Moore. Petitioner added that he first called Moore in September, 1976, and that he had received several calls from Moore before October 5, 1976. In the taped conversations, Petitioner gave a number of excuses or reasons which he testified he thought would discourage Moore's enthusiasm for the deal. These included that Petitioner did not have enough money, that he was considering another job for the "hitman,", that he had friends and relatives in law enforcement, that his phone was tapped, etc. Some of Moore's calls to Petitioner were threatening, including one at 2:30 a.m. on the day of the overt act which suggested that Moore was watching Petitioner's house. These culminated in a meeting later that day in which the Petitioner paid Moore $200 for the "hit." The jury rejected Petitioner's defenses of duress and entrapment.

After the jury was impanelled and sworn but prior to the commencement of testimony, Petitioner made a bill of exceptions on the criminal record of the State's principal witness Michael Moore. The evidence showed that Moore had been placed on three years' probation for burglary on October 3, 1975 and received an early discharge from probation on February 24, 1977. Moore's probation records indicated at least four other arrests. They were marked as Defendant's Exhiibit 1.

Petitioner also tendered certified copies of court records of two other offenses charged to Moore. Defendant's Exhibit 2 showed that Moore had been charged on

October 29, 1974 with the offense of unlawfully carrying a weapon, but that this charge was dropped at the request of Officer D. L. Burgess of the Dallas Police Department during the January term of 1975. Defendant's Exhibit 3 revealed that Moore had been charged on September 13, 1976 in County Court with the offense of assault with bodily injury, but that said charge was dismissed at the request of the District Attorney's office on October 6, 1976, one day after Petitioner's initial contact with Moore. The State tendered the affidavit of non-prosecution in the assault case signed by the complaining witness on September 17, 1976.

Petitioner offered the foregoing evidence on the issues of Moore's bias, motive, violent disposition, and history of cooperation with the police, but the proffer was denied. Later, on direct examination of Moore, the State elicited the evidence concerning his burglary probation which was discharged shortly after Petitioner's arrest. But Petitioner was never able to demonstrate to the jury Moore's prior arrests or their dismissal by prosecution authorities.

On appeal of the resulting conviction to the Texas Court of Criminal Appeals, Petitioner challenged the trial court's exclusion of (1) Moore's arrest on the weapons charge and the dismissal thereof; (2) Moore's arrest on the assault charge and the dismissal thereof; and (3) the prior arrests shown by Moore's probation records. This challenge was based, in part on *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed. 347 (1974) and the federal constitutional provisions invoked here.

The Texas Court of Criminal Appeals acknowledged that evidence of charges pending against a state's witness is admissible to show possible interest and motive of the witness for testifying. *Randle v. State*, 565 S.W.2d 927 (Tex. Cr. App. 1978). The Court further acknowledged that even charges that had been dismissed but could still be refiled within the limitations period could be admissible against a state's witness for these purposes. *Simmons v. State*, 548 S.W.2d 386 (Tex. Cr. App. 1977). But the Court held that this Petitioner's

failure on his bill of exceptions to demonstrate a quid pro quo for the dismissal of Moore's criminal charges—his failure to show a bias or motive for Moore's testimony related to the dismissed charges — rendered them inadmissible before the jury. *Carillo v. State*,591 S.W.2d 876 (Tex. Cr. App. 1979), distinguishing *Simmons v. State, supra* where the defendant had not even been given the opportunity to make a bill of exceptions.

REASONS FOR GRANTING THE WRIT

I. THE LIMITATIONS IMPOSED BY THE TRIAL COURT ON THE CROSS-EXAMINATION OF THE STATE'S PRINCIPAL WITNESS VIOLATED THE CONSTITUTIONAL STRICTURES OF *DAVIS V. ALASKA*.

Review of the opinion of the Texas court in this case is appropriate for reasons embodied in Rules 17.1(b) and (c), Supreme Court Rules. The conclusions of the Texas court on both the harmless error issue and the judge/jury question are in conflict with this Court's language in *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) and many other jurisdictions following *Davis*. Also, the Texas Court purports to resolve the harmless error question when various federal Courts of Appeals are still struggling with this Court's language on the subject.

Preliminary Considerations

The seminal case of *Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed 2d 347 (1974)* establishes the proposition that a prosecution witness' status as a probationer, indictee, or arrestee is admissible to show his possible motive for testifying and the refusal to allow a defendant to probe this area results in an unconstitutional denial of the right to cross examination and due process of law. Various factual similarities bring the instant case squarely within the holding of *Davis v. Alaska*.

First, it should be established that the existence of criminal charges which were dismissed but on which the witness Moore could still have been prosecuted, was a proper *subject* of cross-examination. Such charges went to the witness' history of violence and cooperation with the police as well as his possible bias or motive for participating in the investigation and testifying against Petitioner. This proposition was established as a matter of Texas law in *Simmons v. State, supra.*

In addition, numerous federal cases have permitted cross-examination of government witnesses on dismissed criminal charges which could still be refiled and prosecuted. *United States v. Croucher*, 532 F.2d 1042; 1044-46 (5th Cir. 1976); *but cf. United States v. Hawkins*, 661 F.2d 436, 444 (5th Cir. 1981)(charges brought and dismissed in a foreign country); as well as criminal activities for which the witnesses had not yet been arrestd and charged. *Chavis v. North Carolina*, 637 F.2d 213 (4th Cir. 1980)(witness' assault on a police officer during the trial in which the witness was testifying); *United States v. Hall*, 653 F.2d 1002, 1008 (5th Cir. 1981); *United States v. Williams*, 668 F.2d 1064, 1070 (9th Cir. 1981).

Harmless Error

Part of the justification for the Texas court's rejection of Petitioner's contention can be found in the following language from p. 8 of its opinion:

> "The cross-examination of Moore before the jury revealed that Moore had been in fights, had put people in the hospital and had carried a gun on occasion. Moore admitted that he was on felony probation....."

Without expressly saying so, the Texas court thus applied a harmless error rationale, reasoning that the restriction of Petitioner's cross-examination of Moore had produced no demonstrable prejudice since other sinsister facts about Mooore were brought to the jury's attention.

But the Supreme Court stated that a denial of the right of effective cross-examination

> " 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' *Brookhart v. Janis*, 384 U.S. 1, 3, 86 S.Ct. 1245, 16 L.Ed.2d 314. *Smith v. Illinois*, 390 U.S. 129, 131, 88 S.Ct. 748, 750, 19 L.Ed.2d 956 (1968)."

Davis v. Alaska, *supra* at 318. Thus did the Court dispose of Alaska's harmless error argument. The above-quoted sentence from the *Davis v. Alaska* opinion has given rise to considerable confusion among the circuits as to the applicability of the harmless error doctrine.

In *United Staes v. Uramoto*, 638 F.2d 84 (9th Cir. 1980), the conviction was reversed because the defendant had not been permitted to cross-examine the government's principal witness—a paid informant—concerning threats the witness might have made to the defendant and others. As in the case at bar, Uramoto's defense was that he acted under duress out of fear of the informant-witness. The court first noted:

> We have repeatedly insisted that wide latitude be given to defendants in their cross-examination of key prosecution witnesses (citations omitted), especially when the witness is a professional informant (citations omitted).

Id. at 86. Relying on the sentence from *Davis v. Alaska* quoted above, the Ninth Circuit then concluded that the harmless error doctrine was inapplicable and that the error could not be cured by the absence of any specific showing of prejudice.

Other circuits, including other panels of the Ninth Circuit, have followed the "no harmless error" rule concerning restrictions on the right of cross-examination. *United States v. Alvarez-Lopez*, 559 F.2d 1155, 1160 (9th Cir. 1977); *and see United States v. Morris*, 485 F.2d 1385, 1387 (5th Cir. 1978); *Skinner v. Cardwell*, 564 F.2d 1381, 1388 (9th Cir. 1977)(dictum) *cert. denied*, 435 U.S. 1009, 98 S.Ct. 1883, 56 L.Ed.2d 392 (1978); *United States v.*

Jorgenson, 451 F.2d 516 (10th Cir. 1971) cert. denied, 443 U.S. 319, 99 S.Ct. 2789, 61 L.Ed. 2d 574 (1972). Several other circuits, as well as other panels of the Ninth Circuit, have recognized the possibility of harmless error notwithstanding the language of *Davis v. Alaksa*. *United States v. Gambler*, 662 F.2d 834, 840-41 (D.C. Cir. 1981); *United States v. Brown*, 546 F.2d 166, 172 (5th Cir. 1977); *United States v. Duhart*, 511 F.2d 7, 10 (6th Cir. 1975), *cert. dism'd.* 421 U.S. 1006, 95 S.Ct. 2409, 44 L.Ed.2d 675 (1975); *United States v. Price*, 577 F.2d 1356 (9th Cir. 1978), *cert. denied*, 444 U.S. 1081, 100 S.Ct. 1035, 62 L.Ed.2d 765 (1980); *Chipman v. Mercer*, 628 F.2d 528, 533 (9th Cir. 1980). The "disharmony" in the Ninth Circuit was most recently acknowledged in *United States v. Williams*, 668 F.2d 1064, 1070, n. 14 (9th Cir. 1981) and the overall confusion was best discussed in *United Staes v. Gambler, supra.*

Judge or Jury Question

Besides invoking the harmless error doctrine, the Texas Court of Criminal Appeals permitted the restricted cross-examination in the case at bar because Petitioner's attempts by bill of exceptions to show motive and bias on the part of Moore—or a quid pro quo for his testiomny—had not been fruitful. In both the instant case and in *Carillo v. State, supra*, the Texas court disapproved of allowing the jury to speculate on motive, animus, or bias where it had not clearly been shown by bill of exceptions. Thus, in cases such as this, the court held that the jury's usual function as the sole judge of the credibility of the witness can be pretermitted by the trial judge in his discretion.

This reasoning, however, also conflicts with the principle enunciated in *Davis v. Alaska*, 415 U.S. 308, 317, 94, S.Ct. 1105, 39 L.Ed.2d 347, 354 (1974) where it was said:

> We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning

had counsel been permitted to fully present it.

The question of a motive for Moore's testimony was a fact question for the jury, not a legal question to be resolved in the judge's discretion.

> The motives which operate on the mind of a witness while he testifies should never be regarded as immaterial or irrelevant . . . Great latitude should be allowed the accused in showing any fact which would tend to establish ill feeling, bias, motive or animus upon the part of any witness testifying against him. The jury should be given the opportunity to judge for themselves the witness's credibility in light of the witness's feelings toward the accused and his motive for testifying [citations omitted].

Davis v. Alaska, *supra* at 317-318. The only limitation on cross-examination in this area of which the Supreme court approved was that

> " . . . broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, ..."

id. at 316, 1110. It is submitted that the weakness of the impeaching material or the witness' evasive answers are not the type of "repetitive" and "harrassing" areas the Supreme Court contemplated.

The convictions were set aside in *Chavis v. North Carolina*, 637 F.2d 213 (4th Cir. 1980), in part because the defendants had not been permitted to show where star prosecution witnesses were being confined or the conditions of their confinement. Regarding the "speculation" condemned by the Texas court in the case at bar, the Fourth Circuit wrote that the defendants there should have been allowed to bring the facts to the jury's attention, even though the facts might not necessarily have discredited the witness in the jury's eyes. *Id.* at 226.

Similarly, after allowing the defendant to explore the possibility of a witness's bias for fear that he might be charged with possession of a stolen car, the trial judge in *United States v. Crumley*, 565 F.2d 945 (5th Cir. 1978), instructed the jury to disregard it as being too speculative. Relying on *Davis v. Alaska*, the appellate court ruled that even though Crumley had not explicitly shown a quid pro quo for the witness's testimony, he should have been "permitted to search for such an agreement." *Id.* at 949. From these cases, and many more like them, the jury's role as judge of the credibility of the witnesses is emphasized over trial judge's efforts to limit "irrelevant" or "immaterial" cross-examination. Clearly the Texas court was out of bounds in both *Carillo v. State*, *supra*, and the instant case in taking from the jury the responsibility of appraising the witnesses' biases and motives.

Conclusion

The Supreme Court has never moved to limit its broad holding in *Davis v. Alaska*. There is an obvious inconsistency between the Texas court's handling of the cross-examination issue in the case at bar and the constitutional language in *Davis v. Alaska*. Furthermore, there is explicit confusion among the Courts of Appeals on the applicability of harmless error analysis in this area. The Texas Court of Criminal Appeals found harmless error in seeming contradiction of the language of *Davis v. Alaska*. For these reasons, this Court should grant the writ of certiorari to resolve the areas of confusion which have developed under *Davis v. Alaska* in the past eight years.

II. THE FAILURE OF THE COURT BELOW TO CONSIDER PETITIONER'S ARGUMENT ON APPEAL DEPRIVED HIM OF DUE PROCESS OF LAW AND EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner's conviction, the State of Texas accorded all persons criminally convicted of a felony the right to appeal their conviction to the Texas Court of Criminal Appeals. Art. V, Sec. 5, Tex. Const. (Vernon's, 1955); Art. 4.03, V.A.C.C.P. (1979). The requirement of Art. 44.24(c) V.A.C.C.P. (1979) that the Court of Criminal Appeals deliver a written opinion in intelligible language setting forth the reasons for its decision has always meant that the Court should consider each issue raised in an appeal. Each issue need not be written upon, *Hawkins v. State*, 613 S.W.2d 720, 723, n. 8 (1981); *Ahearn v. State*, 588 S.W.2d 327, 340, n. 3 (1979), but each issue must be considered.

In Ground of Error No. 6 of the direct appeal from his conviction, Petitioner raised a state constitutional issue pertaining to the right of counsel to conduct voir dire examination of the prospective jurors (see excerpt from Appellant's Original Brief, attached as Appendix C). Specifically, Petitioner complained that he had not been permitted to question individual venireman on the panel but rather had been required to propound his interrogatories to the group as a whole. The State in its reply squarely joined issue with the argument that the defendant's access to individual venireman was not unduly restricted (see excerpt of State's Original Brief, attached as Appendix D). Supplemental briefs of both parties devoted an additional fourteen pages of argument to the question raised and these may be brought forward with the record if certiorari is granted.

The Texas Court of Criminal Appeals apparently misunderstood the ground raised on appeal, for their opinion spoke mainly to the propriety of certain questions for voir dire examination (Appendix A, pp. 11-13). One paragraph noted that Petitioner did not have the right to individual voir dire of the venireman separate and apart from the rest of the panel except in capital murder cases, which, of course, was not Petitioner's original complaint (id). The Court below never addressed Petitioner's precise point or his "white horse case", *Plair v. State*, 276 S.W. 267 (Tex. Cr. App. 1926).

Such misunderstandings by appellate courts are not at all unusual and are almost always corrected on motions for rehearing. Petitioner's Motion for Rehearing brought to the appellate court's attention the failure of its original opinion (see excerpt attached as Appendix E). Yet the motion was denied May 26, 1982, without opinion (Appendix B). There were no procedural defects which would have denied Petitioner a fair hearing on the merits of the ground he originally raised. A complete omission by the appellate court to say anything about a particular issue on appeal would present this Court with a clearer question on certiorari; however, the misunderstanding and tangential writing of the lower court in this case constituted no more of an appellate hearing than the complete omission would have.

When a state establishes an appellate process, it is a denial of equal protection and due process for the state to deny an adequate appellate review on the basis of invidious discrimination. *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *Anders v. California*, 383 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Those cases all state that a state which establishes appellate procedures must administer those procedures fairly. It is no less of a denial of due process of law or effective assistance of counsel for such a state to fail to follow the appellate procedure which it has established where such a failure effectively denies the defendant his hearing in the only appeal to which he is entitled. Several Courts of Appeals have lodged objections to procedural rules which deprive a convicted defendant of his right to a fair hearing in the appellate court. *Ruetz v. Lash, 500 F.2d 1225 (7th Cir. 1974); Macon v. Lash*, 458 F.2d 942 (7th Cir. 1972); *Castle v. United States*, 399 F.2d 5642, 650 (5th Cir. 68).

This Court has previously demonstrated its regard for these principles by overturning a decision of the Oklahoma Court of Criminal Appeals which denied a defendant due process of law. In *Eaton v. City of Tulsa*, 415 U.S. 697, 94 S.Ct. 1228, 39 L.Ed.2d 693 (1974), this

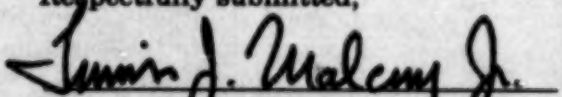
Court held that the Oklahoma court denied due process when it upheld a contempt conviction on charges not laid in the contempt citation. And,

> "There is no distinction in princple between determining a cause upon issues not raised by the pleadings in the actual absence of the party and rendering a decree by refusing to permit a defendant to be heard in his defense or to consider the merits of a sufficient defense...."

Hovey v. Elliot, 167 U..S 409, 446, 42 L.Ed 215, 231 (1897). In Petitioner's direct appeal to the Texas court below, that court did nothing less than to refuse him the right to be heard or to consider the merits of his Ground of Error No. 6.

Because of the denial of due process by the appellate court below, this Court should grant the writ of certiorari and remand the case to the Texas Court of Criminal Appeals for consideration of the merits of this Ground of Error No. 6.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, a member of the bar of this Court, in accordance with Rules 28.3 and 28.5(b), Supreme Court Rules, certify that three true and correct copies of the foregoing Petition for Writ of Certiorari were served on the parties involved in

this case on the 19th day of July
_____, 1982, by placing same in the United States Mails, first-class postage prepaid, addressed to the Honorable Henry Wade, District Attorney, Dallas County Courthouse, Dallas, Texas 75202.

Francis J. Maloney Jr.
Francis James Maloney, Jr.